# STATE OF MICHIGAN

# COURT OF APPEALS

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ROSE MARY NENTWIG,

Plaintiff-Appellant,

v

FIRST OF AMERICA BANK,

Defendant-Appellee.

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UNPUBLISHED
June 15, 2001

No. 221182
Iosco Circuit Court
LC No. 98-001152-NZ

Before: Holbrook, Jr., P.J., and McDonald and Saad, JJ.

PER CURIAM.

## I. Nature of the Case

In this wrongful discharge, age and gender employment discrimination case, plaintiff claims that she should be able to pursue her wrongful discharge claim and invalidate the comprehensive release she signed because her employer fraudulently induced her to sign the release. The trial court rejected plaintiff's attack on the validity of the release primarily because plaintiff specifically acknowledged in the release that "no promises or representations have been made or relied upon regarding the subject matter contained herein…," and because there was no evidence of any misrepresentation by the employer or misunderstanding by the employee. Plaintiff appeals the trial court's summary dismissal of her claim and we affirm for the reasons stated herein.

## II. Facts and Procedural History

Plaintiff held a position with First of America Bank since the 1980s. Like other mid-level managers, plaintiff held various titles at First of America including community bank president, branch sales manager and senior vice-president. Plaintiff's duties included managing and directing the human resource functions for two Oscoda-area First of America branches.

In September 1996, plaintiff, then fifty years old, attended a meeting at which First of America vice-president Rick Spears informed her and other managers that the bank planned to eliminate their positions. After the meeting, plaintiff received an inter-office memorandum from Lehman confirming the elimination of her position as "branch sales manager" as of November 15, 1996. The memorandum explained that the eliminations were the result of "the consolidation of the Retail Administration Department of First of America Bank Corporation." Lehman

testified that First of America never represented to plaintiff that it planned to eliminate the title of "community bank president," merely that plaintiff's position, along with several other management positions, were eliminated because of a fifty percent reduction of management staff throughout the organization. The memorandum also indicated that plaintiff could apply for other positions with First of America but, in the event plaintiff did not receive another job there, she and First of America would enter a separation agreement, a copy of which was attached to the memorandum.

Plaintiff declined to apply for other positions with First of America and, on October 1, 1996, plaintiff signed a separation agreement relinquishing all claims against First of America. In exchange for releasing all claims, plaintiff received health and dental insurance benefits and separation pay calculated at two weeks pay for each continuous full year of service. Plaintiff signed the agreement without thoroughly reading it and without consulting an attorney. Two weeks later, plaintiff received a second separation agreement which was identical to the prior agreement but contained additional retirement benefits. After reading the revised document, plaintiff signed it again without consulting an attorney.

The separation agreement contains the following pertinent provisions:

> 2. In exchange for the separation compensation and benefits provided by First of America, Employee hereby releases First of America …from any and all … causes of action, …claims at law or in equity, claims sounding in contract or tort, which arise under the common law, any federal, state or local statute or ordinances, including, but not limited to, the Elliott-Larsen Civil Rights Act of 1964, … the Age Discrimination in Employment Act, … and any and all actions … which have been or could in the future be filed … which arise out of, or are connected with, in any way, the employment of Employee with First of America, including, but not limited to, Employee's separation from employment with First of America.
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> ***
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> 12. This Agreement is signed by Employee with the express understanding and acknowledgment of the following:
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> > A. Employee acknowledges that Employee has been provided at least forty-five (45) days in which to consider this Agreement, together with the accompanying Explanation of Benefits and eligibility criteria, before signing the Agreement.
> >
> > B. Employee acknowledges that Employee has had the right and benefit to consult with an attorney about the provisions of this Agreement before signing the Agreement.
> >
> > C. Employee understands that Employee may revoke this Agreement as it relates to any potential claim that could be brought or filed under the Age Discrimination in Employment Act … within seven (7) days after the

> date on which Employee has signed this Agreement, and that this Agreement, as it relates to such a claim or claims, does not become effective until the expiration of the seven (7) day period.
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> E. Employee signs this Agreement only after having fully and carefully considered the terms and provisions of this Agreement, and signs this Agreement knowingly and voluntarily under Employee's own free will.
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> ***
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> 15. By signing this Agreement, Employee acknowledges that no promises or representations have been made or relied upon regarding the subject matter contained herein apart from those expressly set forth in this Agreement.

After signing the separation agreement, plaintiff left First of America and began working for Huron Community Bank in Oscoda on November 18, 1996. Plaintiff testified that, in June 1997, she learned that First of America gave one of her former subordinates, Ruth Grant, the title of "community bank president" and that Grant assumed plaintiff's prior duties of managing First of America branches in Oscoda and Baldwin Center. Although plaintiff acknowledged that Grant was the same age as plaintiff and had worked for First of America for more years than plaintiff had worked for First of America, plaintiff testified that she believed First of America eliminated plaintiff's position and others to rid the organization of older employees to make it more attractive for a potential merger with National City Corporation.

Plaintiff filed this action against First of America in June 1997. Plaintiff's complaint alleges age and gender discrimination and also asserts that the releases in her separation agreement are invalid because she signed them based on misrepresentations by First of America. Thereafter, First of America filed a motion for summary disposition under MCR 2.116(C)(7) and MCR 2.116(C)(10) and argued that the release barred plaintiff's claims and that a genuine issue of material fact did not exist regarding plaintiff's sex and age discrimination claims.[1]

Following oral argument, the trial court granted First of America's motion, stating, in pertinent part:

> It does appear as follows in this case, that the Defendant did, in fact, notify Plaintiff and others in like position that those holding a position of sales manager, and I note from the exhibit attached to the deposition, which was furnished by Counsel here a moment ago, apparently, there are several different classifications

[1] Defendant also moved for summary disposition under MCR 2.116(C)(4), arguing that the lower court did not have jurisdiction to hear plaintiff's federal age discrimination claim. The trial court did not consider this argument during the hearing on defendant's motion for summary disposition and it is not raised on appeal.

> of sales manager, different levels, et cetera, all of which were being eliminated and none of which were being retained that Ms. Nentwig was a [sic] apprised of the action by the Defendant to eliminate this position. The argument is made that her concurrent position of community branch president and her undisclosed position of senior vice-president were not eliminated. Certainly, the evidence is clear, and Ms. Nentwig's testimony confirms, that various employees of the Bank were vested with more than one title, and it's not contested that Ms. Nentwig was the person in the particular office that did hold the position of branch sales manager, one of the eliminated positions. She was furnished with forms for release of liability from the – of the Defendant in exchange for certain considerations. She was given a significant opportunity to review those. The release forms themselves, indicated that she would have seven days after execution thereof to rescind her election. The notice given indicated that she hd [sic] until November 15 to make a decision to accept or reject the preferred consideration in exchange for the release. There is no evidence of compulsion or duress. The form indicated, I believe, that she had an opportunity to confer with Counsel if she chose, and, certainly, Ms. Nentwig as a long time bank employee was a person educated in business practices, if not, specifically employment law, recognized and/or should have recognized the significance of the release document with which she was presented and the opportunity for consulting with Counsel at that time if she chose to do so.
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> ***
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> The release, itself, released the Defendant from all torts committed prior to the date of termination of employment and the execution of the release. Apparently, the Defendant, for whatever reason, found that Ms. Nentwig and another person were or should have been entitled to additional benefits and submitted to her a subsequent release, which contained enhanced benefits in [sic] which she also signed, apparently, without consultations of Counsel. There's no evidence that anything in the subsequent release extended the right of the – or the benefits of the Defendant or the rights relinquished by the Plaintiff and the benefits appear to solely have run to the benefit of the Plaintiff.
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> Accordingly, under the facts of this case, I have to find that the releases as executed by the Plaintiff in this case under Michigan Law are valid and enforceable, and as such, the benefits provided to the Plaintiff under the terms of those releases have been tendered by Defendant, and, therefore, Motion for Summary Disposition on that basis will be granted.

Plaintiff appeals the trial court's order entered July 13, 1999, granting summary disposition to First of America and dismissing her claims.

## III. Analysis

Plaintiff claims the trial court erred by granting First of America's motion for summary disposition because a genuine issue of material fact exists regarding her misrepresentation claim.

This Court reviews a grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).[2]

The interpretation of a release is a question of law for the court. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 13; 614 NW2d 169 (2000). As this Court opined:

> Pursuant to MCR 2.116(C)(7), a claim may be barred because of a release. The scope of a release is governed by the intent of the parties as it is expressed in the release. If the text in the release is unambiguous, the parties' intentions must be ascertained from the plain, ordinary meaning of the language of the release. A contract is ambiguous only if its language is reasonably susceptible to more than one interpretation. [*Rinke v Automotive Moulding Co*, 226 Mich App 432, 435; 573 NW2d 344 (1997) (citations omitted).]

To warrant the invalidation of a release based on fraud, any alleged misrepresentation made before the execution of the release must have been made with the intent to deceive. *Hungerman v McCord Gasket Co*, 189 Mich App 675, 677; 473 NW2d 720 (1991). An innocent misrepresentation will not suffice to invalidate a release. *Id*. Furthermore, if a person signs a release specifically acknowledging therein that no representations or inducements have been made, this forecloses him from later claiming that he relied on representations when he signed. *Dresden v Detroit Macomb Hospital Co*, 218 Mich App 292, 298; 553 NW2d 387 (1996).

Here, the trial court properly rejected plaintiff's "misrepresentation" attack on the validity of the release. We affirm the trial court's ruling for several reasons.

One, plaintiff specifically acknowledged that "no promises or representations have been made or relied upon regarding the subject matter contained herein…." As noted above, this explicit acknowledgment forecloses plaintiff from claiming that she relied on alleged misrepresentations by First of America regarding the elimination of her position. *Dresden, supra*.

Two, plaintiff is a sophisticated businessperson who, in her capacity as a bank manager, routinely dealt with contracts and, here, she expressly represented that she understood the release she executed. Plaintiff, as a person knowledgeable about human resources and contracts and

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[2] The trial court also considered First of America's motion pursuant to MCR 2.116(C)(10). Under both rules, the trial court must consider any pleadings, affidavits, depositions, admissions, or other documentary evidence that has been submitted by the parties, however, the moving party is not required to file supportive material. *Diehl v Danuloff*, 242 Mich App 120, 123; 618 NW2d 83 (2000); *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998).

A motion under MCR 2.116(C)(10) is properly granted if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment ... as a matter of law." Where the opposing party fails to come forward with evidence, beyond allegations or denials in the pleadings, to establish the existence of a material factual dispute, the motion is properly granted. *Lash v Allstate Ins Co*, 210 Mich App 98, 101; 532 NW2d 869 (1995).

who stated she understood this particular contract, will not be heard to challenge the validity of this contract on that basis.

Three, importantly, plaintiff was given forty-five days to consider the release and was advised of her right to consult with a lawyer about the release and to revoke the release for seven days after signing it.

Four, we concur with the trial court's judgment that First of America made no misrepresentation to induce plaintiff to sign the release -- a release which conferred significant enhanced benefits to plaintiff. No record evidence supports plaintiff's allegation that First of America falsely represented that it would eliminate the position of "community bank president." Rather, viewing the evidence in the light most favorable to plaintiff, it is clear that First of America's director of human resources informed plaintiff through an inter-office memorandum that First of America eliminated the branch sales manager position, not community bank president. Plaintiff has failed to point to any other evidence that could constitute a misrepresentation.[3]

Accordingly, the trial court properly granted summary disposition to First of America because plaintiff's claims are barred by the release and she raised no genuine issue of material fact for trial regarding her misrepresentation claim.[4]

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Gary R. McDonald
/s/ Henry William Saad

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[3] Even if plaintiff subjectively misunderstood the status of the community bank president position, this alone, without a showing of an objectively false statement by defendant will not support a claim of fraudulent misrepresentation. *Hord v Environmental Research Institute of Michigan (After Remand)*, 463 Mich 399, 410; 617 NW2d 543 (2000).

[4] For this reason, we decline to consider plaintiff's substantive discrimination claims which the trial court also declined to consider.